342.73
P64W

Pillsbury, Albert E.

War amendments.

Return this book on or before the **Latest Date** stamped below. A charge is made on all overdue books.

University of Illinois Library

APR -5 1947

APR 18 1947

MAY 27 1963

OCT 10 1963

MAR 23 19[illegible]

APR 13 1965

APR 13 1965

JUN 10 1965

APR 16 1968

M32

Gaylord Bros.
Makers
Syracuse, N. Y.
PAT. JAN. 21, 1908

THE WAR AMENDMENTS

BY

ALBERT E. PILLSBURY

REPRINTED FROM THE NORTH AMERICAN REVIEW
MAY, 1909

NEW YORK
THE NORTH AMERICAN REVIEW PUBLISHING CO.

Copyright, 1909, by
The North American Review Publishing Co.

342.13
P64w

5F 14, N.M.R.

THE WAR AMENDMENTS.

BY ALBERT E. PILLSBURY.

IN the January number of this REVIEW appeared an article designed to show that the Fifteenth Amendment never became, is not and never has been a part of the Federal Constitution, or of any force or effect in the law of the land. As the reasons there assigned for this novel, if not startling, proposition irresistibly draw after them the inference that the Thirteenth Amendment and parts, at least, of the Fourteenth are equally infirm, this result is accepted by the author of the article, who expresses the opinion that these also are a nullity. The conclusion is that a case should be made, "preferably, although not necessarily, in one of the five States which refused to accept this so-called Amendment," to bring the question before the Supreme Court of the United States for decision.

Except for the highly respectable source from whence this proceeds, it could hardly be regarded as calling for serious notice or answer. As, however, the judicial standing of the author should qualify him to speak with some authority upon a question of Federal constitutional law, the importance of the subject will justify attention to it.

The reason of the supposed invalidity of the Fifteenth Amendment should be quoted in its own terms. Disclaiming any purpose to attack the Amendment as not properly ratified by three-fourths of the States, the writer says:

> "The question which we would raise is of far graver import in its constitutional aspect. It is, that this so-called Fifteenth Amendment is not an *amendment*, but an *addition*, to the Constitution; and that, while *amendments* to the Constitution may be enacted by a vote of three-fourths of the States, in accordance with the provisions for amendment in Article V of the Constitution itself, yet an *addition* to the Constitution cannot be made, except by unanimous consent of all the States, which this Fifteenth Amendment never received."

Sept 20
6 Ap 12

No judicial authority is cited for this distinction between an "addition" and an "amendment" to the Constitution, as there is none; indeed, it is declared that the question "is here raised for the first time," as undoubtedly it is. The article proceeds:

> "Addition is something entirely new, and *not germane* to the original instrument: *amendment* is alteration or improvement of that which in some form is already there. The distinction between *addition* and *amendment* is fundamental, and is very clear to every one. No one will claim that they mean the same thing; and it would, therefore, be unnecessary to expend effort to show the difference between them."

This is taking a great deal for granted. It is familiar knowledge that the question of amending the Federal Constitution arose even before its adoption, and was perhaps the subject of more discussion while its ratification was pending before the States than the original instrument itself. No sooner was it adopted than the process of amendment began. Every one of the fifteen amendments has been the subject of the most searching examination in the courts, in Congress and in the country. The three war amendments have been subjected to a microscopic scrutiny that has taxed the intellectual resources of the bar and judiciary of the United States. Their validity has been challenged upon other grounds; and, as to the Fifteenth Amendment especially, legal ingenuity has been racked for the last twenty years to discover means of evading it or grounds upon which it could plausibly be resisted. But never before has the principle been revealed that an "addition" to the Constitution is not an "amendment" of it, and is of no force or effect unless tried by a parliamentary manual and found to be "germane."

The simplest answer to this argument, the one which lies nearest at hand, ought to be enough. Article V of the Constitution provides for amendment of it. What is "amendment"? The standard dictionaries appear to be agreed in defining it, in legal terminology, as a change or alteration, by way either of correction, excision or addition. There is every reason to believe that this has been the universally accepted meaning of that term, until it occurred to an ingenious mind that the Fifteenth Amendment is not an "amendment" because it is an "addition" to the Constitution.

The express limitations imposed upon Article V are of controlling significance in determining its scope or extent. The

slavery interests insisted upon putting the slave-trade beyond reach of the amending power until 1808, with protection for slavery in respect of taxation. The smaller States demanded security against the greater by perpetual equality of power in the Senate. These concessions were made, and these limitations were expressly laid upon the provision for amendment. No other limitations were laid upon it; and, under the familiar rule of judicial construction that the expression of one thing excludes any other thing, no other limitations can be implied. There is not a word or hint of doubt, in Article V itself or in the debates of the Convention, that, saving the express limitations, the Article was intended to provide for any change or alteration in the Constitution which the people, as the source of all political power, should see fit to make. It will be seen later that this was clearly understood.

Further, the limitations of Article V are not limitations upon the *power* of the people to amend the Constitution. Article V is neither the source nor the measure of that power. The American principle of the sovereignty of the people, and of their right to institute, abolish or alter their government "in such form as to them shall seem most likely to effect their safety and happiness," asserted in the opening words of the Declaration of Independence and reasserted in some, if not all, of the State constitutions, was not only accepted by the framers of the Federal Constitution, but they regarded it as so fundamental that it did not need further expression. It is now judicially settled, as was reasonably evident from the beginning since it is plainly declared, that the Constitution was the act of "the people of the United States" as one people, undivided by State lines. By the Tenth Amendment, indeed by necessary intendment without it, the whole power of alteration of the Federal Government was reserved to the people, acting through their constitutional agencies. Article V is not a reservation of the inherent power of amendment, which did not need to be expressly reserved. It is a provision of certain methods for the orderly exercise of the power, and nothing more.

The Constitution of the United States is not to be interpreted by the rules which govern the acts of private parties; much less by the parliamentary code of a legislative body. The construction of the instrument of government must be as broad as its scope and operation are far-reaching. The assertion of this principle

began in the earliest times, with Chief-Justice Marshall, who called attention to the sparing use of limiting terms in the Constitution, and pronounced a solemn admonition against a narrow or restrictive construction. "We must never forget," he said, "that it is a *constitution* we are expounding." This rule of construction long ago passed beyond possibility of dispute.

If the question whether the Fifteenth Amendment is "germane" to the Constitution could seriously be discussed, it would not be difficult to show that it is germane. If the Fourteenth Amendment is valid as part of the Constitution, the Fifteenth is clearly germane, as it is directly in line with and supplementary to the first and second clauses of the Fourteenth. But, apart from this, the question whether an amendment is germane to the instrument amended is not a question of the relation of words, but of purposes. What are the purposes of the Federal Constitution? They are authoritatively declared, in language so felicitous that it has become classic, in the preamble, where the people of the United States have said that their Constitution is established "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity." Unless the amendment is so foreign to all these purposes that it can bear no legitimate relation to any of them, it is germane to the Constitution. And, if this question can be raised, it cannot be determined by any tribunal of less authority than the people themselves, in whom alone, acting through their representatives, is vested the power to amend the Constitution, to determine the occasion for amending it, and the character and scope of the amendment.

The only claim of anything in the nature of authority for the alleged distinction between an "amendment" which can and an "addition" which cannot be made to the Constitution, rests upon the title under which the first ten amendments were submitted to the people by the First Congress in 1789. It is said that they were "proposed for adoption under the title of 'additions and amendments' to the Constitution," so that "evidently it was recognized that there was a sharp distinction between *additions* and *amendments,* and that the one did not include the other."

If any argument is to be drawn from this title, it is a simple process to show that it is directly the other way. The joint

resolution of Congress submitted twelve articles together, all " as Amendments to the Constitution of the United States," under the title or heading of " Articles in Addition to *and* Amendment of the Constitution of the United States." All of the articles being thus indiscriminately declared to be " in Addition to *and* Amendment of the Constitution," if it was intended to distinguish between some of them as " additions " and others as " amendments," where is the distinction to be found, or how is it to be known? Which of the articles are " additions," and which " amendments " ? The entitling clause, far from affording any means of making such a distinction, is plainly inconsistent with it. It conclusively shows that the words " addition " and " amendment " were not used by way of distinction, but as synonymous and interchangeable terms. The only meaning which the heading will bear, whether regarded as the ordinary expression of common men, or critically, in its precise syntactical significance, is that all of the articles which were ratified are additions to, and all of them are amendments of, the Constitution, without distinction among them.

If the argument sought to be drawn from this title proves anything, it proves too much. If the authors of the amendments actually did recognize the distinction between " addition " and " amendment," and meant by " addition " to describe something different from " amendment," it follows that they actually regarded some of the articles, though we do not know which, as being *additions* to the Constitution, and *not amendments* of it. In other words, the Congress, and its constituents, alike regarded " additions " to the Constitution as being within the provision for amendment, if any such distinction ever occurred to them. The truth undoubtedly is that it never did occur to them; but those who assert the contrary may reasonably be required to accept the results of their own reasoning. There is, in fact, no reason to suppose that the title was drawn with any special care, or was designed to have any particular significance. It need only be added that these " additions " to the Constitution were made in precise conformity to the method and procedure prescribed by Article V; which shows also that " additions " to the Constitution were unquestioningly regarded as directly within the scope and purpose of the Article which provides for amendment.

There are more conclusive answers to the question whether the

Fathers of the Constitution believed that an "addition" to it is beyond the scope of the provision for amendment, and one of them is directly invited by the article under review in suggesting the query whether, if Hamilton or Madison had been asked to explain in the "Federalist" the scope of Article V and if anything could be added to the Constitution which three-fourths of the States might think proper, and had answered that inquiry in the affirmative, there would have been any chance of the adoption of the Constitution? A casual examination of the "Federalist" is enough to furnish the answer. In Number XLIX,* Madison says:

"As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to *enlarge*, diminish or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others."

In Number LXXXV, Hamilton points out that it will be less difficult to obtain amendments of the Constitution after its adoption than to recast the work of the Convention before adoption; and he says:

"Nor, however difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority."

Not only was the possibility, to Hamilton not unwelcome, of "encroachments of the national authority" plainly before him, but in this very passage he was meeting an argument based upon it, as we know from the history of the discussion. If he understood or believed that the Constitution permitted no extension of the Federal field of power by future amendment, this would have been the appropriate and conclusive answer, and it would have been Hamilton's answer.

The "Federalist" essays were in the hands of every statesman and publicist of the time, accepted then and ever since as the

* Numbered XLVIII in some editions.

highest authority on the subject except the debates in the Convention itself. The debates had not then been given to the world. The views of Hamilton and Madison as expounded in the "Federalist" were the views of the Constitution under which it was accepted by the people. But we do not need to know what Hamilton or Madison thought of this question. We know what the people thought of it, and what they did about it. The question whether additions can be made to the Constitution was substantially settled in 1791, by the adoption of the first ten amendments.

It is without force to say that these additions were all in restraint of Federal power. If the Constitution can be altered, it can be altered in either direction. There is nothing in it, or in the contemporaneous discussion of it, or in any subsequent discussion or judicial exposition of it for one hundred and twenty years, to warrant the belief that the Federal powers cannot be extended by addition if the people see fit to extend them. In the controversy provoked by the three war amendments at the time of their adoption, every reason which legal or political ingenuity could conceive was arrayed against them, but not this reason. The war amendments have always been judicially recognized, and in some cases expressly declared, to be additions to the Constitution, in derogation of rights theretofore held by the States, as plainly they are. But, as the court says, "A State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. . . . Every addition of power to the General Government involves a corresponding diminution of the governmental powers of the States." The Fifteenth Amendment has on several occasions been judicially enforced, and never, in the numerous cases where it is considered, has there been intimated the remotest doubt of its validity.

Neither is it to the purpose to say that the first ten amendments were ratified by all the States, or that "*addition* requires *unanimous* consent of the States, while *amendment* may be made and become effective by a vote of three-fourths of the States." It is admitted that the assent of three of the States does not appear in the Federal archives, and it was not needed. There is no ground in the Constitution for any distinction between the assent of three-fourths and unanimous assent. No such thing can be read out of it or into it. No method is expressly provided, even

by unanimous action, for abrogation of the provisions of Article V that slavery is to have a certain protection, and that the States shall be equal in the Senate. Doubtless, they could be or could have been annulled by unanimous action of the States; but, if this should be done, plainly it would be an amendment of the Constitution, and not an addition to it. Thus the only case calling for unanimous consent which can arise out of any constitutional provision is not the case of an addition, but of an excision.

It is enough to say that the Constitution does not contemplate the unanimous consent of the States to anything, nor any contingency requiring such consent. The Constitution stands upon the rule of the majority, and every State which comes into the Federal Union is bound by the action of the constitutional majority, exactly as the individual citizen is bound by it in the ordinary operation of government. This was noticed by Hamilton in the Convention, and must have been understood then as it has been universally understood ever since.

It is said that, if additions can be made to the Constitution, it will be possible to overthrow the Federal system and establish a centralized despotism. This does not necessarily follow, but this very possibility was urged against Article V in the Convention, and that Article was adopted in the face of it. If it were a question of possibilities, it might well be asked: Would it be possible to believe that this acute and enlightened body of men, engaged as they were in creating a Federal government of real powers for want of which the Confederation had proved impotent and worthless, intended to put the people in such a position that they could never again extend its limits, to any extent or under any conditions, for all time to come, or to put them in the attitude of abdicating forever a substantial part of the political power of which they were the depositary, and that this was done without disclosing or indicating by a single word that it was being done? If this is true, the judgment which the world has pronounced upon the Convention of 1787 will have to be reversed.

We now know that it is not true. The debates in the Federal Convention are the final and conclusive evidence. The accepted canon of construction being that a constitution means what it was understood and intended to mean in its inception, we have only to turn to the Madison Papers to settle the question.

The discussions which led up to Article V, while comparatively

brief, disclose enough for the purpose. Some members saw no necessity of any provision for amendment. To them Madison and Randolph replied that the plan was sure to be found defective, as the Confederation had been, and it was better to provide for amendment in a constitutional way than trust to chance or violence. The first reported draft provided for amendment on application to Congress by two-thirds of the States. Gerry objected that this would enable two-thirds of the States to make innovations which might altogether subvert the States. Hamilton did not object to this; it was no more objectionable to subject the whole people of the United States to the majority voice than the people of a State; but he opposed the draft as confining the initiative power to the States, which he thought should be extended also to the Congress. Sherman moved an amendment to this effect, but calling for the consent of all the States, which was opposed and three-fourths was substituted, *nem. con.* Mason objected to the draft finally reported by the Committee on Style as practically leaving the whole power in Congress, so that no "proper" amendment could ever be obtained if the Government should become oppressive. To meet this, Gouverneur Morris and Gerry proposed to require the Congress to call a convention whenever two-thirds of the States should apply for one, which was agreed to. Sherman now opposed any provision for amendment, as it might be fatal to particular States by abolishing them altogether or depriving them of an equal voice in the Senate; and he moved to strike out the whole Article. This was voted down; and, the smaller States being reassured by the proviso, moved by Morris, that no State should be deprived of its equal voice in the Senate, and the slavery interests having already been placated, the Article passed into its final form.

It thus appears that the danger of additions to the Federal power, even so great as possibly to subvert the States, was directly brought before the Convention by several of its most influential members. Their apprehensions were disregarded. The view of one party was that the amending power of the States was liable to be so exercised as to unduly cut down the Federal Government, and of the other, that the amending power of Congress was liable to be exercised to the detriment or even the overthrow of the States, and there were some who thought that this result might follow from any provision for amendment, in any form. Never-

theless, the Convention, with all these hazards in view, determined to give both Congress and the States the power to initiate amendments. It was done deliberately, upon the open and uncontradicted assumption that the amending Article was all-embracing and was subject to no limitations except those which were expressly imposed. By no word or sign is there any indication of a purpose to exclude future additions to the powers of the Federal Government from the scope of amendment, or of any understanding that they are excluded.

So much for the legal question. The article under review is unsparing in denunciation of the "so-called" Fifteenth Amendment. It is said to have been "the source and cause of untold calamity to our country"; it has "greatly injured our Aryan race and seriously threatened the stability of our Aryan institutions"; it was "conceived in iniquity and begotten to subserve grossly partisan purposes"; it is "a fanatical tenet," "read into the organic law so far as it was possible for the fanatics to read it," and "a perpetual source of irritation and annoyance to all true lovers of their country"; and, finally, "it is time that it should be wholly expunged from the statute-book by proper judicial construction."

The main purpose of the present article has already been fulfilled, but something is due to the truth of history. Such assertions as these cannot be justified, and they might, perhaps, be safely left to their own extravagance. Inasmuch as the Fifteenth Amendment has practically been nullified in the States most affected by it, and as Congress has yet manifested no disposition to enforce the representation clause of the Fourteenth, there is hardly occasion for the degree of excitement here betrayed over a question which, in this aspect, may be regarded as academic rather than practical. But there are reasons of vital importance for enforcing the war amendments, which sooner or later will have to be dealt with; and this not merely in the interest of the negro, but of the white man, in order to preserve an equal balance of political power between the States which have disfranchised the negro and the other States of the Union. By the process of disfranchisement that balance is now thrown so far off its equipoise that a single vote cast in the former States offsets, in the Federal Government, two votes cast in the latter. The question is not whether the negro shall be the equal of the

white man, but whether every white man, in any State, shall be politically the equal of every other white man in any other State.

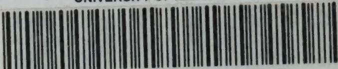
The Fifteenth Amendment can be enforced without danger of negro supremacy in any State of the Union. All that is needed, and all that the extremest political opinion of any part of the country ever has demanded, is an honest and impartial application to both races alike of such suffrage laws, howsoever exclusive, as any State may choose to adopt. The evils ascribed to the Fifteenth Amendment are not due in any degree to that source, but to the refusal of the people of the States most affected, who have no objection to the negro as a negro, to accept him under the Fourteenth Amendment as a citizen. There is every reason to believe that, if the Fourteenth Amendment had been fairly received and observed, the Fifteenth never would have been enacted or thought of.

The proceedings in the adoption of the Fifteenth Amendment are denounced as "grossly improper" and "disgraceful in the extreme," "a history of infamy and the most disgraceful page in our annals," and it is said that the States which were compelled to accept the so-called carpet-bag legislatures "at the point of the bayonet" may well be justified in repudiating their action. It is judicially settled that any claim of coercion of a State cannot be entertained by the courts. But to this assertion of a political or moral justification for repudiating the Fifteenth Amendment, it may be permissible to reply that the Federal Constitution as an entirety is at present in force in eleven States of the Union only "at the point of the bayonet," since its authority had to be re-established there by the military power of the United States. Unless this is a reason for annulling the whole Constitution, it does not appear to add anything to the case against the Fifteenth Amendment.

At this distance from the reconstruction period, and after long and systematic perversion of the facts, there is so much misapprehension or positive ignorance of the truth that it is worth recalling. It was within the power of the dominant party to control the reconstructed States, if this had been its purpose, without the aid of a negro vote. This was not its purpose. The Fourteenth Amendment went no farther than to make the negro a citizen, leaving him to be dealt with by the States as they might see fit; in the hope and belief that he would be fairly treated,

and that some such scheme as President Lincoln proposed, of moderate and gradual extension of the suffrage by impartial tests to the best of the negro race, would preserve order under white supremacy and work out a peaceful and satisfactory solution of the problem, as it would have done if adopted. These liberal terms were flung back upon those who proposed them. The contemptuous rejection of the Fourteenth Amendment by every State of the late Confederacy, accompanied by a system of legislation remanding the negro to servitude in fact if not in law, betrayed a purpose toward him which could not be indulged consistently with the honor or the safety of the country. It also raised the direct issue whether the terms of reconstruction should be prescribed by those lately in rebellion, or by those who had remained loyal to the Union. To this question there could be but one answer. This, and this alone, brought on the Fifteenth Amendment, which was, in simple truth, no more than the last necessary step in the process of suppressing rebellion. It does not confer the suffrage upon a single negro. It forbids discrimination against him as a negro, making suffrage to that extent impartial, but not universal. Every assault upon it is evidence of a desire and purpose to exclude the negro from the suffrage, whatever his character or qualifications, solely because of his color, while admitting to it every white man, however ignorant, worthless or depraved, and retaining, in open disregard of the Fourteenth Amendment, the whole share of political power of which the disfranchised negroes are despoiled.

The dream of annulling the Fifteenth Amendment by judicial decree will never be realized, but the political question will be a source of danger so long as it is left unsettled. If the people continue to ignore the injustice to the negro, they will not always tolerate the injustice to themselves. In the event of a Presidential election turning upon the thirty-odd electoral votes now unlawfully controlled by the white South, is there any assurance, or is it likely, that the party in power would surrender possession of the government to a claimant under such a title? A controversy so arising, precipitated under such conditions, would shake the Federal structure to its foundations. To allow the country to drift into such a situation is forbidden alike by patriotism and statesmanship.


UNIVERSITY OF ILLINOIS-URBANA
3 0112 059098688